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No. 82-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC., *et al.*,

Appellants,

v.

AGRICULTURAL MARKETING AND BARGAINING BOARD, *et al.*,

Appellees.

On Appeal from the Supreme Court of Michigan

BRIEF FOR NATIONAL FOOD PROCESSORS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANTS

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BRIEF FOR NATIONAL FOOD PROCESSORS ASSOCIATION AS AMICUS CURIAE SUPPORTING APPELLANTS

Amicus submits this brief in support of the appellants Michigan Canners and Freezers Association, Inc., *et al.* Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

INTEREST OF AMICUS

The National Food Processors Association ("NFPA") is a national nonprofit trade association representing almost 600 members, who pack in their commercial processing plants the majority of the national production of processed-prepared fruits, vegetables, meats, specialties and fish. These processors typically contract in advance with growers for delivery of the commodity immediately

after harvest at prices and other terms negotiated either directly with the growers or through an agricultural bargaining association. Many NFPA members are located or do business in Michigan, and are therefore vitally interested in this Court's determination whether the Michigan Agricultural Marketing and Bargaining Act (the "Michigan Act") is preempted by the Federal Agricultural Fair Practice Act of 1967 ("the Federal Act").

NFPA and its predecessor association, the National Canners Association, have participated for many years in the deliberation of proposed legislation regulating the business relation between those who grow agricultural commodities and those who purchase these products for processing. The Association was deeply involved in the intense and protracted debates leading to the enactment of the Federal Act, and subsequently participated in debates concerning proposed federal legislation that would have amended the Federal Act to require compulsory bargaining between purchasers and associations of growers.[1] NFPA has also cooperated with regional food processor associations with respect to proposed state legislation affecting grower-processor relations. The Michigan Act is one of a number of proposed or existing state laws affecting these relations, but it is the only state law that designates accredited associations as exclusive bargaining agents for all producers, members and nonmembers alike.

SUMMARY OF ARGUMENT

The Federal Act protects both an individual agricultural producer's right to decide not to join a cooperative association and instead to bargain directly for the sale of his commodities, and a purchaser of agricultural commodities' right to deal directly with individual producers

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[1] *See* Hearings on H.R. 348 *et al.* Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture, 92nd Cong., 1st Sess. (1971).

and not with cooperative associations. The Michigan Act destroys these rights. The Michigan Act binds each producer in a bargaining unit to the terms of the contracts entered into by the association in his area, and forces each producer to pay fees to the association. The Michigan Act requires purchasers of agricultural products to bargain with associations, and forbids purchasers of agricultural commodities from dealing or negotiating directly with an individual producer. Because of these conflicts, the Michigan Act is preempted by the Federal Act.

ARGUMENT

I. THE MICHIGAN ACT IS PREEMPTED BECAUSE ITS REGULATION OF THE PRODUCER-ASSOCIATION RELATION CONFLICTS WITH THE FEDERAL ACT.

There is no dispute over the operation and effect of the Michigan Act. The Michigan Act establishes a state agricultural marketing and bargaining board that accredits cooperative associations formed by producers of agricultural commodities. Mich. Comp. Laws §§ 290.703, 290.707, 290.715. An association is accredited if it has marketing and bargaining contracts with more than 50% of the producers in a defined bargaining unit. These contracts must also include more than 50% of the commodity produced in the bargaining unit. *Id.* § 290.707(c).

Once accredited, the association is the exclusive bargaining agent for all producers in the bargaining unit. *Id.* §§ 290.710(1), 290.713(1). All producers in the bargaining unit are bound by the terms of the association's contracts with "handlers",[2] and all producers must pay a

[2] The Michigan Act defines "handlers" to include, *inter alia*, all persons engaged in the business of acquiring agricultural commodities from producers or associations for processing or sale, and all persons engaged in the business of handling, storing or processing agricultural commodities received from producers or associations. Mich. Comp. Laws § 290.702(g). Unlike the Federal Act, which

service fee to the association, whether or not they belong to the association. *Id.* §§ 290.710(1), 290.713(1).

Once an association has been accredited, the Michigan Act prevents all member and nonmember producers (1) from deciding not to sell their production exclusively through the association, (2) from negotiating with processors for the sale of their own production, and (3) from deciding for themselves to whom they will sell what quantities at what prices. If this statutory scheme stands as an obstacle to the accomplishment of the purposes and objectives of the Federal Act, or makes compliance with both the Federal and Michigan Acts impossible, then the Michigan Act is preempted. *Federal Fidelity Savings & Loan Ass'n* v. *de la Cuesta*, 102 S.Ct. 3014, 3022 (1982); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[3]

A. The Michigan Act's Regulation of the Producer-Association Relation Stands As an Obstacle to the Accomplishment of the Purposes and Objectives of the Federal Act.

The listing of prohibited practices in section 4 of the Federal Act makes it unlawful for—

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includes associations of producers in the definition of "handlers" (*see* p. 5 *infra*), the Michigan Act excludes associations from the definition of "handlers."

[3] The branch of preemption doctrine that invalidates state laws that touch upon areas reserved exclusively to federal regulation is not implicated here, since the Federal Act states that it does not "change or modify existing State law." 7 U.S.C. § 2305(d). As the Michigan Supreme Court recognized, however, this provision of the Federal Act does not resolve the issue presented in this case, since the Michigan Act was not passed until four years after the Federal Act. *Michigan Canners and Freezers Ass'n* v. *Agricultural Marketing and Bargaining Board*, 416 Mich. 706, 332 N.W.2d 134, 137 (1982). No other federal statute has been found which describes its effect on "existing state law," but the U.S. Code heading to a section in another federal agricultural law (7 U.S.C. § 269) refers to its effect on the "operation of existing laws," and the text provides that the statute does not limit the operation of laws "now in force".

> any handler . . . [t]o coerce any producer in the exercise of his right . . . to refrain from joining or belonging to an association of producers . . . or . . . [t]o coerce or intimidate any producer to enter into . . . a marketing contract with an association of producers or a contract with a handler . . . . 7 U.S.C. § 2303(a), (c).

Because the term "handler" in the Federal Act includes an association of producers,[4] this section prohibits an association from coercing any producer to join the association, to enter into a marketing contract with the association, or to enter into a contract with a handler.

These federal prohibitions against association coercion of producers contrast sharply with the provisions of the Michigan Act. Although a number of the prohibited practices listed in the Michigan Act are identical to those in section 4 of the Federal Act, the former includes no prohibitions against association coercion of producers.[5] On the contrary, the Michigan Act provides that an accredited association "shall represent all producers, members and nonmembers alike, who are in the bargaining unit and act as exclusive sales agents for the bargaining unit in negotiations with handlers," and "is the exclusive representative of all producers in the bargaining unit for the purpose of bargaining with all handlers that purchase the agricultural commodity produced in the bargaining unit." Mich. Comp. Laws §§ 290.710(1), 290.713(1). The negotiations by the association on oe-

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[4] 7 U.S.C. § 2302(a)(3), (c), (d); *see also Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974); *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

[5] The provisions in the Michigan Act prohibiting certain handler activities, including coercion of producers (Mich. Comp. Laws § 290.704(1)), do not apply to associations, since the term "handler" is defined in that Act to exclude associations. *Id.* § 290.702(g). The separate prohibitions applicable to associations do not include coercion of producers. *Id.* § 290.704(2).

half of all producers includes "all terms relative to trading between handlers and producers," such as the prices, quality, and quantity of the commodity sold by each producer to each handler. *Id.* § 290.713(1)(a)-(d). The Michigan Act also requires nonmembers of the association to pay a service fee to the association.[6]

In sum, although the Michigan Act does not technically compel the producer to join an association, it binds him to the association's marketing contracts, forces him to pay fees to the association, precludes him from selling his products except through and at terms prescribed by the association, and forbids him as a practical matter from negotiating with handlers. These requirements are wholly inconsistent with the Federal Act's preservation of a producer's right not to join or belong to an association, and not to enter into a marketing agreement with the association. The Michigan Act cannot be reconciled with either the specific prohibitions of the Federal Act or with its stated purpose of preserving the freedom of producers "to join together voluntarily in cooperative organizations." 7 U.S.C. § 2301.

The legislative history of the Federal Act confirms that the Act's purposes and objectives are frustrated by the Michigan Act. Senator Aiken of Vermont introduced the first bill relating to the relationship between producer organizations and handlers on which hearings were held. S. 109, 89th Cong., 1st Sess., Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 1-2 (1966) ("June 1966 Hearings"). That bill prohibited "any processor, handler,

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[6] Mich. Comp. Laws § 290.710(1). Moreover, while the Michigan Act does not expressly make it unlawful for a producer in the bargaining unit to negotiate directly with a handler, the state law does prohibit a handler from negotiating with a producer. Mich. Comp. Laws § 290.704(1)(h). The Michigan Act thus eliminates, as a practical matter, any direct dealing between a producer in an accredited bargaining unit and a handler.

distributor, dealer, or agent thereof . . . who purchases or contracts to purchase an agricultural commodity from a producer . . . knowingly to . . . [i]nterfere with, restrain, coerce, or boycott any agricultural producer in the exercise of his right to join and belong to an association of producers of agricultural products . . . ." The bill did not provide any definition of the term "handler."

Even the supporters of this early bill recognized the importance of maintaining the right of individual producers not to join an association and to bargain individually for the sale of their commodities. Senator Lausche, one of the co-sponsors of the bill, emphasized that:

> [*I*]*t should be the farmer who decides whether or not to belong to such an association.* S. 109 does not attempt to make this decision for him. I do not believe that government should make this decision for him. *Membership should be voluntary.* (June 1966 Hearings at 6) (emphasis added).

However, the bill on its face contained no protection for the right of a producer to refrain from joining an agricultural association and to bargain individually. That shortcoming was the focal point of the testimony of numerous witnesses and commentators, as exemplified by the testimony of the Texas Independent Ginners Association that the bill "fails, wholly, to guarantee the right not to join an association of producers of agricultural products," and that the bill should "guarantee that the farmer may remain a free agent." June 1966 Hearings at 146.[7]

Despite these strong endorsements of express protection for the right of producers to decide not to join a producer association, the substitute amendment proposed by Senator Aiken that was the subject of the next round

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[7] *See also* June 1966 Hearings at 134 (testimony of Independent Cotton Industries Association) ("it is equally important to safeguard the freedom of the farmer not to join such cooperatives . . ."); June 1966 Hearings at 41 (testimony of National Livestock Feeders Association).

of hearings did not address this concern. The bill continued to protect only the producer's right to join an association, and not his right to refrain from joining.[8] The bill also provided that the prohibitions established by the bill would only apply to "handlers," which was defined then to exclude associations of producers.[9]

The absence of any protection in this substitute bill for the producer's right not to join an association met with strong opposition. Groups such as the National Livestock Feeders Association stressed that it was as important to provide "for the protection of individual freedom of choice on the part of agricultural producers as it is to protect their right of organized activities in their behalf," and urged that "an addition be made to S. 109 providing comparable legal protection for individual producers or groups of producers who choose *not* to join or *not* to belong or associate with a given group or association . . ." (Sept. 1966 Hearings at 222).[10]

S. 109 was not reported out of Committee in the Eighty-ninth Congress. In the Ninetieth Congress S. 109 was re-introduced in an amended form. The exemption of agricultural associations from the definition of "handlers" was deleted, so that the prohibition against inter-

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[8] Amendment 933 to S. 109, 89th Cong., 2d Sess. § 4, Hearings on a Substitute Amendment to S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 89th Cong., 2d Sess. 175-77 (1966) ("Sept. 1966 Hearings").

[9] *Id.* § 3(a).

[10] *See also* Sept. 1966 Hearings at 206 (testimony of Texas Independent Ginners Association) ("[t]he proposed amendments to S. 109 wholly fail to guarantee the right of an individual producer of agricultural products not to join an association of producers"); Sept. 1966 Hearings at 195 (testimony of National Canners Association) (the bill "should also, in the interest of justice and fair play, impose similar restrictions on bargaining associations, in order to protect the rights of the canner and grower to deal with whom they please, free of intimidation, threats and coercion").

ference and coercion applied to these associations.[11] Some Senators interpreted this bill as confirming the right of producers not to join a cooperative if they so chose. Senator Lausche, co-sponsor of the bill, explained that the decision whether to belong to an association "is completely up to [producers], being permitted either to join or not to join." May 1967 Hearings at 13. Senator Williams testified in support of the principles of the bill, and stated that the "freedom of choice of any farmer *to join or not to join* an organization of his choice *is a basic American right*, and it must be protected." May 1967 Hearings at 10 (emphasis added). Senator Jordan similarly stated:

> I think the law intends that [the producer] can bargain collectively in cooperatives or in associations, and he should not be intimidated in his right to belong, but he should not be made to join unless he wants to join. *He ought to be able to sell anywhere he wants to sell.* May 1967 Hearings at 170 (emphasis added).[12]

But substantial doubt was expressed whether the bill would accomplish the desired goal of ensuring that a producer would be free to decide not to join an association. As the National Canners Association testified:

> The definition of "handler" may well include—and probably does include—a bargaining association. We understand that is the intent. On the other hand, if the Senator will address himself to the prohibitions,

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[11] S. 109, 90th Cong., 1st Sess. § 3(a), Hearings on S. 109 Before the Subcomm. of the Senate Comm. on Agriculture and Forestry, 90th Cong., 1st Sess. 1-3 (1967) ("May 1967 Hearings").

[12] Supporters of the bill similarly stressed that "[c]ooperative bargaining associations are voluntary organizations. The closed shop and union shop concepts available to organized labor are not being sought by farmers." May 1967 Hearings at 32 (testimony of California Canning Peach Association); *see also* May 1967 Hearings at 26 (testimony of American Farm Bureau Federation).

> it is clear that *the provisions are all in terms of protecting the right of the producer to join an association and protecting the association itself. There is nothing in this bill which speaks about the right of a producer not to join an association.* May 1967 Hearings at 82 (emphasis added).

Many other organizations also urged that the bill be amended to protect explicitly the right of a producer not to join an association and instead to bargain individually for the sale of his products.[13]

These admonitions were heeded by the Senate. In the bill passed by the Senate and sent to the House of Representatives for consideration, the prohibitions established in Section 4 were amended to proscribe conduct that interfered with "any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers . . . ." [14] As the Senate Report on the bill succinctly stated:

> This bill is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing or bargaining association . . . . *The objective of the bill is to protect the producer in the exercise of a free choice.* (emphasis added).

S. Rep. No. 474, 90th Cong., 1st Sess. 1, 5 (1967) ("Senate Report"), *reprinted in* 1968 U.S. Code Cong. & Adm. News 1867, 1871.

When S. 109 was the subject of committee hearings in the House of Representatives, the bill was uniformly

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[13] *See, e.g.*, May 1967 Hearings at 94 and 198. One organization proposed an amendment to section 4 that would prohibit a producer "in the exercise of his right to join or not to join an association of producers." *Id.* at 147.

[14] S. 109, 90th Cong., 1st Sess. § 4(a); Hearings on S. 109 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. 2-3 (1967) ("Sept. 1967 Hearings").

viewed as protecting a producer's right not to join an association and instead to bargain individually for the sale of his product. Congressman Langen explained in supporting the bill:

> [The bill] is designed to protect the agricultural producer's right to decide, free from improper pressures, whether or not he wishes to belong to a marketing and bargaining association. Sept. 1967 Hearings at 85.

Many of the organizations that had opposed the earlier versions of the bill now supported its adoption. The National Livestock Feeders Association, which had urged that a producer's right not to join an association be recognized, testified:

> We have contended that it was just as important to provide for protection of individual producers in exercising their individual rights to not join, or not to belong, or associate with a given organization, or for not following the dictates and demands of said group or association . . . . This objection has been honored in the new language . . . in Section 4 . . . . Sept. 1967 Hearings at 181.[15]

The House Committee favorably reported H.R. 13541, which mirrored (with non-germane differences) S. 109 as passed by the Senate. 114 Cong. Rec. 7463 (1968). The House Committee rejected an amendment that would have removed associations from the groups subject to the prohibition against interference with producers' right to choose whether to join an association. H.R. Rep. 824, 90th Cong., 1st Sess. 4-5 (1967).

In the House floor debates the bill's protection of a producer's right not to join an association was univer-

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[15] Other organizations also withdrew their previous opposition to the bill as a result of the Senate amendments. *See* Sept. 1967 Hearings at 91-92 (Chamber of Commerce), at 153-54 (National Broiler Council), and at 136-37 (National Canners Association).

sally recognized. Congressman Poage, Chairman of the House Agriculture Committee, agreed that the bill will protect the right of a producer to say to an association "I do not want to join your association and you cannot force me into it." 114 Cong. Rec. 7450 (1968). Other Congressmen stressed that under the bill, the decision whether to join an association "belongs to the farmer," [16] that the Senate "has spelled out the right of farmers to join or not to join these associations," [17] and that the bill protected the voluntary right of processors to join together in associations.[18] As S. 109 was enacted into law it prohibited conduct that interferes with "any producer in the exercise of his right to join and belong to or refrain from joining or belonging to an association of producers . . ." 7 U.S.C. § 2303(a).

Against this legislative backdrop, the Michigan Supreme Court's holding that the Michigan Act does not conflict with the Federal Act cannot be supported. The state court held that the Federal Act "does not afford an absolute right to a producer to deal directly with a handler." 332 N.W.2d at 139. But the legislative history is replete with statements like that found in the Senate Report, which affirm that the "objective of the bill" was to provide the producer a "free choice" not to join a marketing and bargaining association, and that joining such an association would be strictly "voluntary." [19] The Federal Act protects the right of a producer "to sell anywhere he wants to sell." May 1967 Hearings at 170

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[16] 114 Cong. Rec. 7464 (statement of Rep. Sisk).

[17] 114 Cong. Rec. 7466 (statement of Rep. Latta).

[18] 114 Cong. Rec. 7459 (statement of Rep. Scherle); 114 Cong. Rec. 7457 (statement of Rep. Goodling).

[19] Senate Report at 1, 5; *see also Garrison* v. *Dairymen, Inc.*, No. 80-1080-3, slip op. (D.S.C. July 28, 1980) ("[the] primary objective [of the Federal Act] is to protect a producer's freedom to choose between joining and not joining a cooperative").

(statement of Senator Jordan). The legislative history makes clear that the Federal Act does afford a producer the right to deal directly with a handler rather than through an association. That right is extinguished by the Michigan Act, which allows a group of producers to form an accredited association and control all terms of sale for nonmembers. Because the Michigan Act thus conflicts with the purposes and objectives of the Federal Act, the Michigan Act is preempted.

B. Compliance With Both Acts Is Impossible Because the Federal Act Prohibits Coercion of Producers by an Association And the Michigan Act Requires That Nonmember Producers Sell Only at Prices and Other Terms Negotiated Between an Accredited Association and Handlers.

The Michigan court rejected the argument that the coercion of nonmember producers embodied in the Michigan Act is in direct conflict with the federal prohibition against coercion of producers by associations and other handlers. 332 N.W.2d at 139. The court reasoned that although the Federal Act makes it unlawful for a handler to coerce a producer, "it does not forbid a *state* from requiring exclusive representation of individual producers where a producer majority sees fit," and "[e]ven if [the Michigan Act] were read to require a producer to *join* an association, the coercion would be the product of state action not handler action." [20]

The Michigan court cited no authority for the state action doctrine it relied upon to avoid finding a direct conflict between the Michigan and Federal Acts, but if that theory has any validity whatever it must derive from the body of law that has developed in the Supreme Court's

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[20] 332 N.W.2d at 139 & n.13 (emphasis in original). The court failed to note that under the Federal Act the term "handler" includes associations of producers. 7 U.S.C. § 2302(a)(3), (c) and (d).

application of the state action doctrine as announced in *Parker* v. *Brown*, 317 U.S. 341 (1943). In that case the Court held that even though a program established by the California Agricultural Prorate Act "would violate the Sherman Act if it were organized and made effective solely by . . . private persons," the California law was not preempted by the Sherman Act because the latter is "a prohibition of individual and not state action." 317 U.S. at 350-52. The holding was based upon the fact that "it is the state . . . which adopts the program and which enforces it with penal sanctions," and the "state itself exercises the legislative authority in making the regulation and in prescribing the conditions of its applications." 317 U.S. at 352. The Court made clear, however, that a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351.

The state action doctrine announced in *Parker* v. *Brown* and considered in a number of subsequent cases has involved the question of whether a state law is in direct conflict with and thus preempted by the Sherman Act or other federal antitrust laws.[21] The Michigan court's reliance upon the doctrine in a preemption case involving a federal law other than an antitrust law may indeed be unusual, but the basis for and analysis of the doctrine in *Parker* v. *Brown* and its progeny would appear to be squarely on point for determining whether the Michigan Agricultural Marketing and Bargaining Act directly conflicts with the Federal Agricultural Fair Practices Act.[22] In both cases the central inquiry is whether the state law and regulations directly mandate an activity which is prohibited by a federal law, or whether the state law pur-

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[21] *See* Shenefield, *The Parker* v. *Brown State Action Doctrine and the New Federalism of Antitrust*, 51 Antitrust L. J. 337 (1982).

[22] The "standards of fair practice" established by the Federal Act (7 U.S.C. §§ 2301, 2303) proscribe some activities that would probably also constitute violations of the federal antitrust laws.

ports to authorize private persons to engage in conduct which violates the federal law.[23] In *Parker* v. *Brown* the state promulgated the regulations and prescribed the conditions of their application to producers. 317 U.S. at 346-48, 352. In contrast, the Michigan law puts in the hands of associations the authority to negotiate on behalf of nonmember producers and through such negotiations to prescribe the price, quality and quantity of the commodity to be sold by all producers to each handler. Mich. Comp. Laws § 290.713(1).

The distinction between "state action" and private action authorized by the state has been elaborated by this Court in a number of cases since *Parker* v. *Brown*. In *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), for example, the Supreme Court invalidated on grounds of federal supremacy a state law establishing a wine resale price maintenance plan. Addressing the question of whether the plan met the state action exemption of *Parker* v. *Brown*, the Court found:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. 445 U.S. at 105-06.

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[23] The state action issue is controlling in determining whether the Michigan Act mandates activity which is squarely prohibited by the Federal Act. As the argument in the text will set forth, the state action doctrine is not applicable in this case. But even if the Michigan court were correct in holding that the coercion prescribed in the Michigan Act is state action, the question would remain whether the state act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Act. That argument is addressed in part I.A of this brief. In *Parker* v. *Brown* the Court held that the California law involved state action. It nevertheless went on to consider whether the California law was otherwise preempted by federal agricultural laws. 317 U.S. at 352-59.

The Court thus held that although the state program had been clearly articulated and firmly expressed by the state, it was not so actively supervised by the state itself as to qualify as state action and thus to avoid preemption by the Sherman Act.[24]

The Michigan court's characterization of association coercion of producers under the Michigan Act as "state action" thus finds no support in the cases in which the state action doctrine has been applied or rejected by this Court. Whereas in *Midcal* the key factor was the establishment of prices by private parties without review by the state (445 U.S. at 105), under the Michigan Act the association establishes through negotiations with handlers the price, quantity and quality of the commodity to be sold by member and nonmember producers to each handler, without review or approval by the state.[25] Acting under the authority granted by the state, an association is thus empowered to coerce unwilling producers to enter into marketing contracts with the association and to enter into specific contracts with handlers, at terms negotiated by the association. That coercion by associations is precisely what is prohibited under section 4 of the Fed-

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[24] At 445 U.S. 105 n.8, the Court cited Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 Colum. L. Rev. 898, 916 (1977). On the page cited by the Court the author distinguished between "state action" mandating the precise anticompetitive conduct under attack, and a law which required specific persons to adhere to prices "determined by the private parties." This latter clause of course describes the type of statutory scheme found in the Michigan Act.

[25] The state may become involved in prices and other terms of sale only if an association and a handler cannot reach agreement in their negotiations, and then only through compulsory arbitration before a three-person committee. Mich. Comp. Laws §§ 290.716-290.725. In any event, a nonmember producer is powerless to demand arbitration if he does not like the price and other terms negotiated and dictated by the association.

eral Act.[26] The conflict is direct and unavoidable, and compliance with both federal and state statutes is a physical impossibility. The Supremacy Clause requires that the Michigan Act be invalidated.

II. THE MICHIGAN ACT IS PREEMPTED BECAUSE IT REQUIRES A HANDLER TO DEAL WITH ASSOCIATIONS, AND THE FEDERAL ACT PROVIDES THAT A HANDLER CANNOT BE REQUIRED TO DO SO.

The Federal and Michigan Acts adopt completely divergent approaches to the question whether a handler can be required to deal with an association of producers. This conflict provides an independent basis for the preemption of the Michigan Act.

The Michigan Act requires a handler to deal with an accredited association of producers. It provides that an accredited association is the exclusive bargaining agent for all producers in the bargaining unit. Mich. Comp. Laws §§ 290.710(1), 290.713(1). A handler is required to bargain with an accredited association if the handler had substantial past dealings with the producers in the bargaining unit. *Id.* § 290.704(1)(g). A handler is forbidden from negotiating with an individual producer in the bargaining unit. *Id.* § 290.704(1)(h).

The Federal Act adopts the diametrically opposite approach. While the Michigan Act requires a handler to deal with an accredited association, the Federal Act expressly provides that it does *not* "require a handler to deal with an association of producers." 7 U.S.C. § 2304. The two laws are thus, on their face, wholly inconsistent.

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[26] Section 4(c) makes it unlawful for a handler (including an association) "[*t*]*o coerce . . . any producer to enter into . . . a . . .* marketing contract with an association of producers or *a contract with a handler.*" 7 U.S.C. § 2303(c) (emphasis added).

The legislative history of the Federal Act also makes clear that one of Congress' central purposes was to protect the right of a handler to deal and bargain individually with producers rather than through a bargaining association of producers. Because the Michigan Act eliminates that right, it stands as an obstacle to the accomplishment of the Federal Act's purposes, and is accordingly preempted.

A. The Legislative History of the Federal Act Shows That Congress Intended To Protect the Right of a Handler To Bargain With Individual Producers and Not Associations.

The first Senate hearings on S. 109 were devoted in substantial part to the question whether the proposed legislation would preserve the pre-existing right of handlers to choose to deal directly with producers rather than with an association of producers. Some proponents of the legislation insisted that S. 109 left unfettered a handler's right not to deal with a bargaining association; the American Farm Bureau Federation testified that it "does not seek, and will not support, legislation to force processors to negotiate with marketing associations. We seek only legislation which sets forth rules of fairplay . . ." June 1966 Hearings at 15.[27]

In spite of these unambiguous statements of intent by proponents, the absence of specific protection for a handler's right to choose his suppliers engendered vigorous opposition to S. 109. Witnesses contended that the bill was wholly inconsistent with the *Colgate* doctrine,[28] which recognized a purchaser's unilateral right under the anti-

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[27] *See also* June 1966 Hearings at 108 (testimony of National Milk Producers Federation) ("[t]he purpose of S. 109 is not to require any processor to purchase products from organized producers . . .").

[28] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

trust laws to choose his suppliers.[29] The proposed legislation was viewed as restraining a handler's right to choose "to purchase raw products from growers with whom he could negotiate on an individual basis. . . ." [30]

The bill was opposed by the Department of Justice for this very reason. In responding to the chairman of the House Judiciary Committee's request for the Department's views on the legislation, the Department warned that the bill "might be interpreted as having the effect of forcing purchasers to buy from cooperatives and their members," and opposed the section of the bill containing these possible prohibitions.[31]

When S. 109 was re-introduced in 1967 (not having been reported out of committee in the previous Congress), it provided that associations of producers would themselves be subject to the bill's prohibitions. (*See* pp. 8-9, *supra*). Some took this to mean that a handler's right to decide whether to deal with an association was now protected; Senator Lausche, co-sponsor of the bill, observed that:

> The bill does not force purchasers of farm products to deal with bargaining associations. *That decision is the decision of the purchasers, to decide for themselves whether they will deal with the individual farmer or deal with the marketing association.* May 1967 Hearings at 13-14 (emphasis added).[32]

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[29] June 1966 Hearings at 49 (testimony of National Tax Equality Association).

[30] June 1966 Hearings at 124 (testimony of National Canners Association).

[31] Letter from Ramsey Clark, Deputy Attorney General, to the Honorable Emanuel Cellar (July 25, 1966), *reprinted in* May 1967 Hearings at 107-08.

[32] *See also, e.g.*, May 1967 Hearings at 25 (testimony of American Farm Bureau Federation, the principal proponent of the legislation) ("[t]he legislation does not . . . [f]orce purchasers of agricultural products to deal with a marketing association of producers").

Nevertheless, various witnesses found the bill unclear on the issue, and argued that—

> The handler's rights to refuse to deal with a bargaining association and to select the producers from whom he will purchase should be made explicit by means of provisos in the act guaranteeing these rights.[33]

These concerns were addressed in S. 109 as passed by the Senate and sent to the House of Representatives for consideration. The Senate added a new section 5 to the bill, which provided:

> *Nothing in this Act shall* prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in an association of producers, nor prevent handlers and producers from dealing with one another individually on a direct basis, nor *require a handler to deal with an association of producers.* S. 109 § 5; Sept. 1967 Hearings at 3 (emphasis added).

The Senate Report on S. 109 made clear that Section 5 was intended as a "[d]isclaimer of any intent to prohibit proper dealings between producers and handlers or to compel dealings between handlers and associations." Senate Report, at 1. The Senate Report affirmed that while the bill would prohibit handler interference with producers' efforts to form associations, and would prevent handlers from refusing to deal *with a producer* merely because the producer belonged to an association, the bill would protect a handler's right to insist upon direct dealing with an individual producer rather than dealing with an association as bargaining agent of the producer:

> *Section 5 disclaims any intent* to prevent handlers and producers from selecting their customers and

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[33] May 1967 Hearings at 86 (testimony of National Canners Association); *see also, e.g.*, May 1967 Hearings at 210 (testimony of American Corn Millers Federation).

> suppliers for any reason other than a producer's membership in an association of producers, or to prevent handlers and producers from dealing with one another individually on a direct basis, or *to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so.* While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the part of processors and other purchasers of agricultural products, that the bill in fact went further than intended . . . .
>
> While the bill does not prevent handlers and producers from dealing with one another individually on a direct basis, it does prevent handlers from exerting any improper pressure in an effort to weaken associations or discourage membership. *While the bill does not require a handler to deal with an association of producers, it certainly makes clear that farmers have a right to form such associations and should be protected in the exercise of this right.* The fact is clear that an association of producers which has obtained the voluntary membership of a large number of farmers deserves respect and recognition by the handler of agricultural products. Senate Report, at 7 (emphasis added).

The distinction between forbidding a handler from coercing a producer not to join (or to quit) an association, while preserving a handler's right to refuse to deal and bargain with the association itself, was recognized by the House of Representatives. As Congressman Schwengel explained:

> The Act . . . would not force purchasers to deal with marketing associations of producers nor would it prevent a purchaser from choosing the producers with whom he deals. Sept. 1967 Hearings at 36.

Other House members made the same observation. Representative Matsunaga stated that "[t]his legislation does

not purport to give farmers bargaining power per se . . . . It would preserve the long recognized right of a businessman in America to deal with whom he chooses, stipulating only that he does not use an individual's membership in a producers' organization as a basis for refusing to deal with him." Sept. 1967 Hearings at 124. Representative Steiger pointed out that "[t]he legislation does not force any processor to negotiate with any agricultural marketing organization or state which growers a processor must deal with." Sept. 1967 Hearings at 152.

As a result of the addition of the explicit protection of a handler's right not to deal with a bargaining association, groups that had previously opposed the legislation withdrew their opposition.[34] The House Committee reported H.R. 13541, which contained a Section 5 substantially the same as that in S. 109 as passed by the Senate. The Committee Report accompanying H.R. 13541 stated that nothing in the House modification of Section 5—

> is intended to impair the right of handlers and producers to deal with one another on an individual basis, which is preserved by section 5. Accordingly, *nothing in the bill prevents a handler from refusing to deal with a bargaining association notwithstanding its designation by a producer in a contract as his exclusive bargaining agent.* H.R. Rep. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added).

The full House of Representatives likewise recognized that the bill was designed to preserve the right of a handler not to deal with associations. Representative Steiger explained on the floor that "[t]he legislation does not force any processor to negotiate with any agricultural marketing organization . . . ." 114 Cong. Rec. 7460

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[34] Sept. 1967 Hearings at 138 (testimony of National Canners Association) ("the bill would not force handlers to deal with bargaining associations"); Sept. 1967 Hearings at 147-48 (testimony of National Association of Frozen Food Packers); Sept. 1967 Hearings at 154-55 (testimony of National Broiler Council).

(1968). Representative Montgomery, co-sponsor of the legislation, likewise observed that the act would not "require a handler to deal with an association of producers." 114 Cong. Rec. 7461 (1968). *See also* 114 Cong. Rec. 7465 (statement of Rep. Sisk). After amending Section 5 in a non-substantive manner,[35], the House adopted H.R. 13541, and bill was enacted into law in its present form.

This legislative history makes clear that a key purpose of the Federal Act is to preserve a handler's right to deal directly with individual producers, rather than with an association of producers. Yet the Michigan Act expressly makes it unlawful for a handler "[t]o negotiate with a producer included in the bargaining unit after an association is accredited" (Mich. Comp. Laws § 290.704 (1)(h)), and affirmatively requires a handler to bargain with an accredited association if the handler has had substantial past dealings with the producers in the bargaining unit prior to accreditation. *Id.* § 290.704(1)(g). The Federal Act and the Michigan Act could not be more inconsistent.

* * * *

Despite the Federal and Michigan Acts' facial inconsistency, two theories have been propounded why the acts are not in conflict. First, the Solicitor General suggests that the Federal Act does not protect the right of a producer to deal with individual handlers rather than associations. Second, the Michigan Supreme Court held that the manner in which the Federal Act addresses handler

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[35] Section 5 of H.R. 13541 as reported by the House Agriculture Committee had provided that the Act did not "prevent handlers and producers from dealing with one another individually on a direct basis, nor require a handler to deal with an association of producers." Because these two clauses were viewed as "saying basically the same thing," the first clause was deleted. 114 Cong. Rec. 7464 (statement of Rep. Sisk, sponsor of the amendment); *see also* 114 Cong. Rec. 7465 (statement of Rep. Sisk) (the amendment to Section 5 "does not in any sense change the intent or the meaning of the disclaimer section").

rights leaves the states free to prohibit handlers from dealing directly with individual producers. Neither theory is valid.

B. Section 5 of the Federal Act Makes Clear that a Handler May Refuse To Deal With an Association.

The Solicitor General in his amicus brief supporting probable jurisdiction expresses "doubt" whether the Federal Act was intended "to create or protect a [handler's] right to deal with the individual farmer of his choice" rather than with an association.[36] The Solicitor General states that an obligation to deal with an association arises by a producer's appointment of an association as his agent, coupled with the Federal Act's prohibition of discrimination against a producer because of his membership in or contract with an association. Solicitor General Br. 12 n.5. But the result of this analysis would be that a handler could be forced to deal with an association of producers by the terms of the Federal Act, notwithstanding the fact that Section 5 of the Federal Act unambiguously provides that a handler is *not* required to do so.

The Solicitor General was apparently driven to this tenuous statutory construction by his belief that "[i]f handlers can insist on dealing directly even with producers who have voluntarily appointed an association as their designated agent, the protections of the [Federal Act] would not be meaningful." Solicitor General Br. 12. That fear is unfounded. The Solicitor General himself described the "principal thrust" of the Federal Act to be the prevention of handler interference "with the *formation* of cooperative associations by exerting pressure on individual farmers." *Id.* at 6 (emphasis added).[37]

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[36] Brief for the United States as Amicus Curiae Supporting Appellants ("Solicitor General Br."), at 12.

[37] That characterization is supported by the testimony at the Senate and House hearings relating to alleged handler misconduct, the bulk of which concerned threats or refusals to deal or contract

Section 4 prevents any such interference: so long as an association is in an organizational stage, or has not yet sought to be designated as exclusive bargaining agent of its producer members, handlers are strictly forbidden from interfering with the association or refusing to deal *with producers* because of their membership in the association. An association can thus be formed without fear that the very act of its creation can lead handlers to refuse to deal with its members. The association is thus able to attract members and attain a competitive bargaining position free from coercion or interference with members or prospective members.

But once the association has been designated by its members as their exclusive bargaining agent, the members have precluded themselves from dealing directly with handlers. The handlers are left with the choice of purchasing the members' products by bargaining with the association, or of refusing to deal with the association and looking elsewhere for raw products.[38] The protected status of the association and its members afforded by the Federal Act before the association is designated as bargaining agent may well have permitted the association to attract enough voluntary members that a handler will

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with a producer merely because he had joined or attempted to form an association. *See* June 1966 Hearings at 64 (testimony of National Farmers Union); May 1967 Hearings at 25 (testimony of American Farm Bureau Federation); June 1966 Hearings at 19 (testimony of F. Kirby); June 1966 Hearings at 25 (testimony of A. Snapp). Any such handler conduct is clearly prohibited by Section 4 of the Federal Act.

[38] If the handler makes a business decision not to deal with an association, he may not attempt to deal directly with a producer who has contractually appointed an association as his exclusive agent. The Federal Act does not alter the prohibitions in "existing State law" against tortious interference with contractual arrangements such as those that may be entered into between producers and associations. 7 U.S.C. § 2305(d).

have no choice but to make the business decision to deal with the association. But the Federal Act does not itself require him to do so; Section 5 expressly provides that a handler cannot be required "to deal with an association of producers."

The court in *Butz* v. *Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974), agreed that while the Federal Act forbids interference with a producer's right to join or form an association, the Act also preserves a handler's right to decide not to deal with an association. The court held that the defendant handler had violated the Federal Act because it had terminated its contract with a producer simply because the producer had joined an association, without first determining whether the producer's membership in the association would require the handler to deal with the association. 386 F. Supp. at 238-39.[39] Had the association attempted to require the handler to deal with it, the court recognized that the handler "could then have lawfully refused to deal with [the association] and [the producer]." *Id.* at 239.

The Solicitor General attempts to distinguish *Butz* v. *Lawson Milk Co.* as presenting a "different question" because it involved a preexisting contract contemplating direct dealing between a handler and producer. Solicitor General Br. 13 n.6. But there is nothing in the Court's opinion, or in the language or legislative history of the Federal Act, that even arguably limits the disclaimer in Section 5 to those few situations in which a handler and a producer have a preexisting contract. Section 5 contains no such limitation, eliminating without qualification

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[39] The court found that the defendant handler had also violated the Federal Act when it inserted clauses in its contracts with producers that terminated the contract if the producer "entered into an agreement with any . . . association" regardless of the nature of that agreement. 386 F. Supp. at 240.

any requirement that a handler deal with an association of producers.[40]

C. The Michigan Act Is Inconsistent Wtih Congress' Intention To Protect Handler Rights.

The Michigan Supreme Court concluded that because the right of handlers not to deal with associations is expressed in Section 5 of the Federal Act in terms of what the Act does not do,[41] the Federal Act cannot be seen as creating or protecting any handler rights. 332 N.W.2d at 138. The state court concluded that the Michigan Act's requirement that handlers deal with accredited associations did not conflict with the Federal Act.

That analysis cannot be reconciled with the House Report's explicit statement that Section 5 was intended to protect a handler's right to deal with individual producers:

> [The Federal Act is] not intended to impair the right of handlers and producers to deal with one another on an individual basis, *which is preserved by section 5.*" H.R. Rep. 824, 90th Cong., 1st Sess. 4 (1967) (emphasis added).

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[40] Developments since enactment of the Federal Act confirm that the Act protects the right of handlers to decide not to deal with associations. In 1971 hearings were held on proposed legislation that would have required handlers to bargain with associations of producers. The sponsor of one of these proposed bills recognized that the Federal Act "did not impose the obligation to bargain [with associations] on commercial food processors or their representatives," and that "[a]s a result, the food handlers could refuse to bargain with a producer organization and buy directly from individual producers even though they were members of organizations set up to negotiate for them." Hearings on H.R. 348 *et al.* Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture, 92nd Cong., 1st Sess. 2 (1971) (statement of Rep. Sisk).

[41] Section 5 of the Federal Act provides that "[n]othing in this chapter shall . . . require a handler to deal with an association of producers."

The fact that Congress protected a handler's right not to deal with an association through a provision explaining what the Federal Act did *not* do merely reflects the difference between the handler rights protected by Section 5 of the Federal Act and the producer rights established by Section 4. The Federal Act is designed to protect producer rights by prohibiting handlers from interfering with producers engaged in various specific activities. Since adequate protection from such interference was not thought previously to have existed (at least with respect to some of these rights),[42] it was necessary for Congress to set forth affirmatively in Section 4 the producer conduct with which handlers may not interfere.

But the right of handlers to choose their suppliers was a pre-existing right that the Federal Act was designed to maintain, not establish.[43] Unlike the producer activities included in Section 4 that had allegedly been inhibited by handlers, the handler rights established in Section 5 had not been infringed by associations or others, or by any state law then existing. Accordingly, it was sufficient for Congress to provide, as it did in Section 5, that the Federal Act does not interfere with a handler's right not to deal with an association, rather than affirmatively to establish a handler's right to deal with individual producers.

The fact that Congress logically chose the Section 5 formulation for protecting handler rights thus does not bear on the question whether the Michigan Act is preempted by the Federal Act. As we have shown, the Congressional intent to protect a handler's right not to deal with an association is clear from the language and legislative history of the Federal Act, and it is the existence

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[42] *See* June 1966 Hearings at 4 (Statement of Senator Aiken); May 1967 Hearings at 19-21 (testimony of the Secretary of Agriculture); Senate Report, at 4-7.

[43] *See* pp. 18-19, *supra*.

of a conflict between Congressional intent and state law that determines whether the state law is preempted. Since the Federal Act confirms a handler's right not to deal with an association, while the Michigan Act destroys that right, the Michigan Act is invalid.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

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